United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

76-7457

To be argued by
DANIEL M. COHEN

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

CARL E. PERSON,

Plaintiff-Appellee,

against

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, and ATTORNEY GENERAL OF NEW YORK STATE,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

DEFENDANTS-APPELLANTS' REPLY BRIEF

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(A)

The core of the plaintiff's attack upon the validity of Disciplinary Rule 7-109*c* may be summarized as follows: perjury has not been prevented and inducements to perjury by experts and other witnesses have not been eliminated in situations that do not involve the hiring by an attorney of expert witness on a contingent fee basis; accordingly, the restriction upon the inducement to perjury envisioned by DR 7-109C should be invalidated as unreasonable.

The plaintiff's approach disregards the principle announced in *Semler* v. *Oregon State Board of Dental Ex-*

aminers, 294 U.S. 608 (1935), where Chief Justice HUGHES stated (p. 610):

> "Nor has plaintiff any ground for objection because the particular regulation is limited to dentists and is not extended to other professional classes. The State was not bound to deal alike with all these classes, or to strike at all evils at the same time or in the same way. It could deal with the different professions according to the needs of the public in relation to each."

As to the balancing of interests argument advanced by plaintiff, we suggest that such an argument and the weight to be attributed to it should be addressed to the agencies responsible for the enforcement of the Disciplinary Rule rather than to a federal court. Revision should be accomplished by a legislative process, where all of the factors suggested by the plaintiff may be given appropriate consideration, after hearings if necessary; rather than by constitutional dictate. The federal courts should not substitute their judgment, as to the most desirable method of regulating the legal profession, for the judgments of the state agencies entrusted with that responsibility. Even tested by a standard of strict judicial scrutiny, the disciplinary rule is constitutional by reason of the compelling interest which the State has in regulating the standards of an attorney's professional conduct.

With reference to the fact that the code of lawyers' responsibility does not extend to the hiring of experts by a client appearing *pro se*, two answers must be obvious: 1) the code does not seek to regulate the conduct of non-lawyers; 2) the ordinary rules of evidence and cross-examination remain available to test the credibility of an expert witness hired upon a contingent basis by a non-lawyer client appearing *pro se*.

(B)

Plaintiff contends (Br. Pl. 6, 7, 11 and 12)* that defendants waived any right they had to discovery because no discovery was requested. This argument is misleading. Plaintiff in effect is suggesting that defendants were dilatory in not seeking formal discovery. The facts belie any such suggestion.

The Complaint in this action was filed on September 8, 1975 and defendants filed their answer on October 28, 1975 (JA 1). On November 17, 1975 plaintiff sought to depose The Business Roundtable, and defendants moved to vacate the notice of deposition (JA 1). While this motion was pending, plaintiff moved for leave to amend the Complaint to add The Business Roundtable as a party defendant. This motion was opposed by defendants. On the return date of plaintiff's motion, however, the motion was withdrawn and plaintiff orally moved for the convening of a three-judge court pursuant to 28 U.S.C. § 2281 requesting, over defendants' opposition, that his brief and affidavit in support of his motion to include The Business Roundtable as a defendant be deemed papers in support of his motion for a three-judge court.

On March 25, 1976, the Court rendered its decision denying plaintiff's motion for a three-judge court, but suggesting that declaratory relief might be appropriate with respect to DR 7-109C (JA 1). Within two weeks, plaintiff moved for summary judgment declaring DR 7-109C unconstitutional (JA 1; 88).

In the affidavit and brief of defendant Association of the Bar of the City of New York in opposition to that motion (JA 97) and during oral argument, it was contended that plaintiff's affidavits were conclusory in nature and that it

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* Page references to plaintiff's brief are preceded by the abbreviations "Br. Pl."

was necessary to obtain the underlying facts in order for the Court to properly determine the motion. Moreover, it was contended that the Court should not decide the motion based solely on plaintiff's affidavits without affording defendants the opportunity to test the statements made in the affidavits, especially since the issue involved was the constitutionality of a State rule.

It is thus apparent that there was no waiver of defendants' right to discovery or any concession that the "facts" set out in plaintiff's affidavits were sufficient for summary judgment. Nor can it be concluded that defendants were dilatory in not initiating formal discovery because the denial of the motion for a three-judge court may have obviated the need for *any* discovery.

(C)

Rule 56(e) of the Federal Rules of Civil Procedure requires that an affidavit in support of a motion for summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify as to the matters stated therein." Plaintiff's affidavits (JA 41-63; 93-96; 100-114)* are not based upon the personal knowledge of plaintiff and do not set forth "facts", as required by the Rules, but merely state conclusions which would not be admissible in evidence. Examples of the foregoing abound, but a few "statements of fact" from plaintiff's brief will suffice:

(1) "Antitrust actions are vital to the country" (Br. Pl. 3).

(2) "The concentration of wealth in this country is at a dangerously high level." (Br. Pl. 3).

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* The "Supplemental Affidavit" (JA 100-114) was served on the day of the hearing on plaintiff's motion for a summary declaratory judgment.

(3) "The nation's form of government depends on how effective the nation's antitrust laws are enforced." (Br. Pl. 3, 4).

(4) "For an antitrust plaintiff and his lawyer to prevail in a meritorious case the clients must have substantial resources available to spend in the litigation" (Br. Pl. 4).

(5) "The Nabcor Plaintiffs cannot afford to pay for the services of the expert witnesses needed in their action." (Br. Pl. 4).

(6) Failure to use expert witnesses resulted "in loss of a preliminary injunction motion" in the Nabcor Action. (Br. Pl. 4).

Because of the conclusory nature of plaintiff's affidavits, summary relief was improper.

(D)

Plaintiff now argues that New York "has no clear-cut policy against witnesses testifying on a contingent-fee basis . . ." and that "DR 7-109C, therefore, does not express any State policy concerning witnesses testifying on a contingent-fee basis" (Br. Pl. 14), citing as support *Marine Midland Trust* v. *40 Wall Street Corp.*, 13 A.D.2d 118 (1st Dep't 1961). As stated in defendants' opening brief, *Marine Midland* is a limited holding, but even if it could have been extended to proceedings other than court-administered derivative actions and Burchill Act proceedings, the subsequent incorporation of DR 7-109C into the Rules of the Appellate Division, First Department has greatly diminished its precedential value. Moreover, to the extent that plaintiff now argues otherwise, he is presenting this Court with an appropriate case for application of the doctrine of abstention. *Railroad Comm.* v. *Pullman Co.*, 312 U.S. 496 (1941); *Carey* v. *Sugar*, 425 U.S. 73 (1976).

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed.

Dated: New York, New York
December 28, 1976

Respectfully submitted,

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AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Louis Vasquez, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 132 Graham Boulevard, Staten Island, New York That on December 29, 1976, he served 2 copies of Brief on

Carl E. Person,
132 nassau Street,
New York, New York

by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

Louis Vasquez

Sworn to before me this
29th day of December, 19 76.

John V. D'Esposito

JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 30-6466150
Qualified in Nassau County
Commission Expires March 30, 19 77